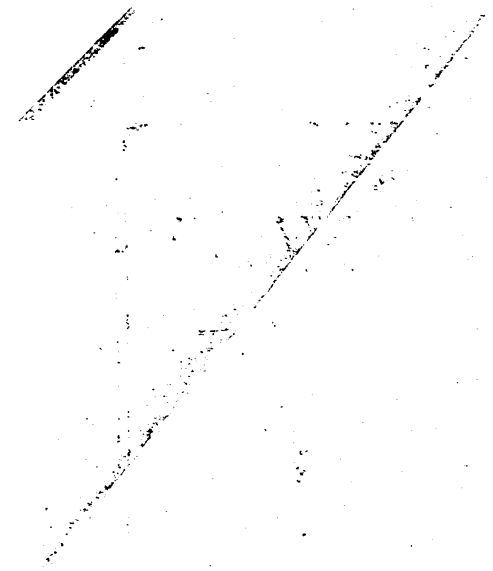
BUFFALO CONFERENCE 1890

INTERNATIONAL MARINE INSURANCE RULES



INTERNATIONAL LAW ASSOCIATION,
33, CHANCERY LANE, LONDON, W.C.

BUFFALO CONFERENCE, 1899.

INTERNATIONAL MARINE INSURANCE RULES.

BY
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INTERNATIONAL MARINE INSURANCE RULES.

MARITIME Commerce is international: its operations ramify from State to State. It would be well then that the rules of its conduct should be not only sound and just, but also the same in all places; that, in short, they should be international.

Perhaps the evils arising from absence of uniformity are not very acutely felt except by suffering individuals, because men adapt themselves to the conditions. Nevertheless, the progress of commerce depends upon improvement in those conditions, and the improvement of the law is not one of the least of the changes by which that progress may be fostered and helped forward. It is the faith of our Association that to bring about increased uniformity of law, among peoples whose efforts and ventures work together, and into one another, is to effect a change which will make for convenience and well-being. And as an Association we have, time after time, set ourselves (not always with success) to find out how the varying rules which govern maritime commerce may be brought into harmony.

The relations of commercial men are largely regulated by their contracts. But contracts do not get rid of the operation of laws. A contract is written always upon a background of law, which fills in the gaps of the written terms. Or perhaps it may more accurately be said that a contract creates a relationship of which the law fills out the body, while the expressed terms define merely the special features. Contracts may be made with reference to

some selected body of law; and where that is not the case expressly, there are more or less definite rules which determine the system of law deemed to be referred to. But wherever the body of law to which reference is made is not entirely ascertained and understood, the conflict of laws introduces doubts and uncertainties, and the man who has thought only of rules to which he has been accustomed finds himself at times in the clutch of others he knew nothing of; and thus unexpected, and it may be unjust, results occur.

These trite observations apply to the insurances which play so large a part in maritime commerce, and there are considerations of a practical kind which makes uniformity of insurance law even more desirable than uniformity in the law on such subjects as carriage by sea. Contracts of affreightment made by the owner of a ship for a voyage are generally made in one place, with people of one nationality, and in one form. The business of insurance has in recent times become very widespread; it tends to spread more widely, and its seat in relation to one venture is often in several places. A shipowner with a valuable ship, or a merchant with large quantities of goods, can and often does effect his insurances, not in one country, but in several. It is plain that such insurances should be on the same terms; unless it be supposed that the assured is content that his rights of indemnity shall as to one part be on one basis, and as to other parts on another basis.

In practice the difficulty in such cases is sometimes got over, when the discrepancies of law are thought of, by agreeing that the policies shall be governed by the law of some particular country; or again by some particular set of rules, as the London Rules, the New York Rules, or the Hamburg Rules.

Now, if a body of rules existed which formed a complete system of insurance law, suitable for use in all countries, and understood alike in all countries, then by incorporation of them into all insurance contracts, the business of marine insurance, wherever transacted, would stand on the same legal basis. But, short of that, if a body of rules could be prepared dealing with

those parts of the business of marine insurance on which the laws of maritime countries *differ;* and if those rules were such as to commend themselves to business men, so that they might come to incorporate them habitually into their insurance contracts; it would come about that those contracts would in effect be all on the same legal basis, although each would actually be governed by the law of the country in which it was made, subject to the rules so expressly made part of it.

The better plan, the plan which would be most worthy of the civilisation of which we boast, would no doubt be to get rid of the differences in the laws themselves. But that would involve legislation, and, moreover, similar legislation by all the legislative bodies concerned. I am not afraid that even the most optimistic of us can look upon that as a practical hope. No Englishman will recommend it. And possibly such legislation would not be desirable, even if it were attainable, in the present position of matters. Men are working now on various methods, and probably the effort to come together by the more elastic means of contract would be a prudent preliminary to fixed legislation. At any rate, that is the most we can at present work for.

Now this Association can point with just pride to successful work done on these lines in the past. Before the York-Antwerp rules of General Average were formulated and agreed upon, there existed a great and troublesome diversity of practice with regard to the adjustment of General Average claims and contributions in different countries, according to the law at the destination of the adventure upon which the General Average sacrifices were incurred.

The York-Antwerp rules are not a complete code of General Average law; they deal with the points upon which differences existed. They have been adopted very widely in contracts of affreightment, and in policies, and in that way we have now in effect a nearly uniform law of General Average.

I propose that this Association should make a similar effort in relation to marine insurance law. Let us search out the subjects on which serious differences exist. Let us arrive, if we can, at an

agreement as to the soundest and most practical principles upon those subjects; and let us work those principles out in a body of rules for general adoption.

For success, it is all important that the proposals should commend themselves to practical men. But if they express the best features of the different systems, and if they set forth clear rules upon matters which are at present left vague and doubtful, I think we may well hope that the value of the work will be recognised by adoption of the rules. There ought not, one would think, to be insuperable difficulty in arriving at agreement as to which are the most sound and practical principles. There is nothing local in the subject; the objects to be attained are the same everywhere; and there does not seem to be room for conflict of interests, unless it be in the interests of some who may desire to confine the insurance market by keeping up obstructions.

I will not pretend to indicate all the points on which differences exist; but three branches of the law stand out prominently in this respect, and if they can be successfully dealt with an important advance will have been made towards the proposed end.

These are:

I. The law as to Constructive total losses.

II. The law as to the effects of unseaworthiness and negligence.

III. The law as to Double insurances.

Upon these points I have drafted a set of Rules which are in your hands, and I will endeavour now to explain the principles on which they are drawn.

I.

Constructive Total Loss; and the Right to Abandon.

First, then, as to the rules governing the right of the assured to treat the subject which he has insured as totally lost, and to claim payment from his insurer of the full amount insured, although that

subject may not in fact have been wholly destroyed, or wholly lost, in a physical sense.

This matter divides into two. We have, first, cases in which the assured has by perils insured against been deprived of possession, or of the control or use of the thing insured, not absolutely, but with a prospect of regaining it, though after an indefinite time. Such cases are captures in which there is a prospect of avoiding a condemnation; embargoes; arrests; and other detentions by governing powers.

Secondly, we have cases in which by perils insured against the subject of insurance has been so far damaged, or completion of the adventure has been so frustrated, that the assured is allowed to treat the loss as total.

With regard to the first class of cases, I do not propose to say much. There is substantial agreement that in cases of capture and indefinite arrest the assured may abandon; that is to say, may claim payment of a total loss on giving up his rights in the insured property to the insurer. There is, however, some difficulty in accurately stating a rule on the subject; and a difference exists as to the extent of deprivation necessary to justify abandonment.

The French Code (369) does not expressly set a minimum limit of time during which the capture or arrest must have continued. Jacobs [1] (s. 832) refers to a controversy of writers on the point, and says that in Belgium, where the provision of the Code (199) is like that of France, the state of capture must have lasted at least one and a half months. The German Code (865), on the other hand, is precise, that in cases of embargo or arrest, the vessel must have been detained six, nine, or twelve months, according to the part of the world in which the ship or goods may be.

In No. 3 of the Rules which I have drafted, an endeavour is made to express what is, I believe, the rule in England and also in America on the point. That justifies abandonment when the loss of possession or control is by a detention imposed for an indefinite period; or where the deprivation is for a definite

[1] Droit Maritime Belge.

period, but for so long as to be inconsistent with the insured adventure.

Leaving that proposal with these few remarks, I come to the other class of cases, viz., those in which the assured claims to be paid a total loss in consequence of damage to the thing insured. On this I shall have to trouble you at some length.

There may be such damage to the thing insured that, though it still exists, and is still in the assured's possession and control, it is in such a state or is so placed that it has ceased to be worth anything to him, for use as a thing of the kind insured. In such cases the thing is for beneficial purposes destroyed. In a business sense it has become a total loss.

The assured is, therefore, allowed to claim payment in full of the amount insured, on the terms of giving up whatever may remain of the thing.

That more or less imperfectly describes the idea expressed by the phrase constructive total loss.

But the expression is comparatively a modern one. You do not find it in the old codes of Insurance Law, or in the modern codes of Europe based upon them. And the idea which it expresses is not exactly the idea of those codes.

The older idea is that, where the thing insured has by perils insured against sustained a great disaster (*sinistre majeur*), so that the assured is placed in a position of great difficulty and risk with regard to it, he should be allowed to abandon it to his insurers, passing over to them the whole risk and difficulty, and obtaining from them the amount insured. And thus the French Ordonnance of 1681 (Art. 46), and the French and other Continental codes derived from that, do not deal with the question When may a loss be considered as constructively total? but with the question When may the assured abandon?

We have to consider both of these ideas, the right to abandon and the right to treat as total a loss which is not *actually* total, and the systems of law arising out of those ideas. For both are still alive and in force.

The "right to abandon" has been given by the codes, in a

sense arbitrarily, on such occasions as the legislator has chosen to define; not because on the facts of the occasion the contract of indemnity requires it. On the other hand, the right to treat a thing as totally lost, because in effect it is so, is not arbitrary; it depends upon the ability to show, on the facts of the particular case, that the thing is really for practical purposes lost.

The constructive total loss idea is the descendant of the idea of liberty to abandon; but its consequences are different.

The difference in the resulting systems of law will be seen by comparing French law with English law.

The French Code de Commerce reproduces with some modification Art. 46 of the Ordonnance of 1681, which allowed abandonment in cases of capture, shipwreck (*naufrage*), breakage of the ship (*bris*), stranding, arrest of princes, or entire loss of the things insured. The modern code (1807), Art. 369, allows abandonment in cases of capture, shipwreck (*naufrage*), stranding with breaking (*échouement avec bris*), innavigability by sea peril, or arrest, or loss or deterioration of the thing insured amounting to not less than three-quarters.

There have been great discussions over the meanings of "naufrage," and "échouement avec bris," which I need not enter into; but it seems clear that where there has been a disaster to a ship of such a kind as to come within the technical meaning of "naufrage," or of "échouement avec bris," that is sufficient to entitle the assured to abandon, without inquiry as to the ultimate consequences, or as to whether it was worth while to raise the ship, or to get her off the strand.[1] And further that it also entitles the assured of cargo on board to abandon, without inquiring whether or how far that cargo has been affected.[2]

The codes of Holland, Belgium, Spain have similar provisions. The modern German code[3] has not followed the French system on this subject. I shall have occasion to refer to it again.

Looking now at the law of England we find that, though largely informed and influenced by the early codes and by the writings

[1] Jacobs ii. 398. [2] Jacobs ii. 400.
[3] Arts. 865, 875, 444.

of the great French jurists, that law has had an independent development. It has become formulated with increasing distinctness by the decisions of the Courts during the last 150 years; and the development has taken place with reference to, and under the pressure of the methods of business and practices of commercial men. It was at first largely guided by their opinions. The law may fairly be said to express the adaptation of the old ideas to modern business needs. But the development still proceeds, and the adaptation cannot yet be said to be perfect.

One clear result has, I think, been that the right of the assured to abandon in cases of damage, to hand over his property and its difficulties to his underwriter, and claim payment in full of the amount insured, as distinguished from the doctrine of constructive total loss, has been wholly or nearly eliminated. That did not take place at once; and the traces of the older doctrine are still found in the language in common use.

Thus in Arnould, so lately as 1857 (2nd Ed. 1066), there is no satisfactory recognition that the idea of constructive total loss is independent and complete in itself. On the contrary his test of a constructive total loss was whether the state of things was such as to entitle the assured to give notice of abandonment. And though he discussed the idea of constructive total loss independently, still his method of approaching the subject led him to make it include cases of a vague description, resembling the French view, in which recovery is "very doubtful" and therefore notice of abandonment permissible.

Another result of the development of English law has been to get rid of the idea that in an insurance on ship there may be a total loss by loss of the voyage which she is prosecuting. Considerable difficulty is introduced into some of the earlier cases[1] by language suggesting that a casualty which makes the voyage no longer beneficial to the owner may justify an abandonment and claim for total loss. That, however, is not the law. If the ship owing to her condition or position is not worth the expense of

[1] *Goss* vs. *Withers*, 2 Burr, 683; *Parsons* vs. *Scott*, 2 Tann, 363; *Falkner* vs. *Ritchie*, 2 M. & S. 290.

recovery and repair, and therefore cannot complete her voyage, she is a constructive total loss, but is so independently of this latter consideration. The underwriter on ship is not concerned with the profitableness or otherwise of the adventure; and on the other hand the fact that the voyage may have been completed, by the ship's arrival at her destination, does not affect the right of the assured to treat her as a constructive total loss, if she is not worth repairing.

If now we consider the law in the United States we shall find that in principle it accords with that of Great Britain. Though the right of abandonment is spoken of it is a right which depends upon showing that a constructive, or technical, total loss has happened. Though great attention was paid to French law in the early decisions of the American Courts they did not adopt the view that an assured might abandon to his underwriter because of the happening of a *sinistre majeur*. The law in America, as in England, does not depend upon niceties as to the word which describes the accident, but upon the effects of the accident in the particular case.[1]

And yet when we come to cases of contructive total loss by damage, we find that in one highly important particular the law in America differs from that of England. In England the question whether the ship or the cargo has in effect been lost by damage, is tested by considering, in the case of ship, whether the cost of recovery and repair will exceed the value of the ship when repaired; or, in the case of cargo, whether the cost of recovering and bringing it to its destination will exceed its value when arrived.

In America, on the other hand, the test is whether the cost of recovery and repair will exceed *one half* the repaired value, in the case of ship; and, in the case of cargo, is whether the loss or deterioration with the expenses of recovery amount to more than *one half* the value of the cargo. When half the value of the thing insured has been lost, the law in the United States allows the assured to treat it as a total loss.

This divergence appears to have taken place very soon after the

[1] See per Story, J., in *Peele* vs. *Merchants Ins. Co.*, 3 Mason, 27.

formation of the Union. The earliest reported case of which I am aware in which the test of half-damage was applied is *Gardiner* vs. *Smith*,[1] decided in the Supreme Court of New York in 1799. But the test had been spoken of, in argument, in the case of *Fuller* vs. *McCall*,[2] in the Supreme Court of Pennsylvania in the year 1795. And in *Marcardier* vs. *Chesapeake Ins. Co.*,[3] decided in the Supreme Court in 1814, Story, J., after saying that the exact quantum of damage to goods to authorise abandonment as for a total loss had not been decided in England, and citing Le Guidon [4] as authority that half is sufficient, said, "This rule has received some countenance from more recent elementary writers; and from its public convenience and certainty has been adopted as the governing principle in some of the most respectable commercial states in the Union, and perhaps is now so generally established as not easily to be shaken."

It seems pretty clear that the rule came into the law from Le Guidon—a treatise published in Rouen between 1556 and 1584; or, more immediately, from Park on Insurances, a book which at the end of the eighteenth century and in the early part of the nineteenth was regarded in America as of great authority. This appears from Story's judgments, and from Kent's Commentaries.[5]

Park wrote originally in 1786. His seventh edition was published in 1817. At p. 230 of that edition he says:

"In a French treatise called Le Guidon it is said that the insured may abandon to the underwriter, and call upon him for a total loss, if the damage exceed half the value of the thing; or if the voyage be lost, or so interrupted, that the pursuit of it is not worth the freight. The same idea with respect to the circumstances which will justify an abandonment seems to prevail in almost all the foreign ordinances."

He then refers to the authority of the English decisions, and says:

"From these decisions we may collect that the right to abandon must arise upon the object of the insured being so far defeated by a peril in the policy

[1] 1 Johns, 142. [2] 1 Yeates, 464. [3] 8 Cranch, 39, p. 47.
[4] Ch. 7, Art. 1, 9. [5] See Kent Comm. iii., 329.

that it is not worth his while to pursue it; such a loss as is equally inconvenient to him as if it had been total."

And later on he continues :[1]

"From what has been said it will appear sufficiently evident that the owner cannot abandon, unless at some period or other of the voyage there has been a total loss; and, *therefore*, if neither the thing insured nor the voyage be lost, and the damage sustained shall be found, upon computation, not to amount to *a moiety of the value*, the owner shall not be allowed to abandon."

That appears to me a very singular passage; an illustration of how the influence of authority may obscure to a writer the inconsequence of a conclusion. Park did not, however, lay down that half-damage is enough, except in that negative way; and it is surely impossible to deduce such a rule from the premiss that there must have been a total loss, or a loss equally inconvenient.

In his great judgment in *Peele* vs. *Merchants Ins. Co.*,[2] delivered in 1822, Story, J., applied the rule to an insurance of ship, tracing it from the sources already indicated, and said, "The rule seems to be founded upon this consideration, that a ship so much injured is not worth repair, and therefore may be abandoned as innavigable, and infected with a fatal infirmity."

That explanation is unsatisfying. If a ship can be repaired so as to sail the sea as well as before, for three-quarters or five-sixths of her value when repaired, how is it possible to say that she is not worth repairing, or is innavigable, or infected with a fatal infirmity? Is not the conclusion forced upon us that we are here in the presence of a fiction? That this loss by more than half-damage is fictitiously, not constructively, total? And that the fiction is traceable to the early ideas that, as between assured and underwriter, difficult cases should be handed over to the latter?

If the rule had been confined to ships, and if the comparison were made between the cost of repair and the former value of the ship, as is the case in applying the 75 per cent. test under the modern European codes,[3] there might be something in the

[1] Page 231. [2] 3 Mason, 27, p. 69.

[3] Germany, 877, 444; Holland, 663–666; Spain, 789; France, 369; Belgium, 199.

fiction. For a repaired ship is generally worth less than she was before, and the deduction of 25 per cent. might be considered roughly to represent that. But in the same case Story, J., decided that the comparison must be with the repaired value of the ship, and without deducting thirds from the cost of repairs. Other decisions of the Supreme Court are to the same effect; and I understand that that is the law of the United States generally.[1]

The effect of these decisions has been partly got rid of by special clauses in the policies in use. Thus in the Boston form of policy,[2] a clause is inserted that "the insured shall not have the right to abandon the vessel for the amount of damage merely unless the amount which the insurer would be liable to pay *under an adjustment as of a partial loss* shall exceed half the amount insured." Thus requiring deductions of thirds from the repairs. If the amount insured represents the former value, and if the rule of deducting thirds in estimating a partial loss were applicable to the whole of the cost of repairs, this would be equivalent to requiring that the cost of repairs should amount to not less than three-quarters of the former value, which is the rule in Continental Europe. But in fact thirds are not deducted from the whole cost of repairs. Moreover the clause leaves out the cost of recovery as an element in the comparison. It refers only to "damage"; to matters which can be brought into an adjustment of a partial loss.

I have dwelt at some length on the history of this question, because I think that may help us in deciding which test of constructive total loss should be adopted. It is clear that if we are to have a common basis of law one uniform rule must be chosen. I submit that on this point the English rule should be followed. It is the rule of most modern development. It is the most definite; the most free from fictions, and fictions breed embarrassments; it most nearly accords with the principle that insurance means indemnity; and it corresponds best with modern methods of insurance.

A few words on that last point. Those who are familiar with

[1] Ph. 1538. [2] Barber, Prin. of Ins., 307.

marine insurances will, I think, agree that one of the most important distinctions is that between insurances against losses total and partial, and against losses only which are total. It is that fact which makes the meaning of constructive total loss so important. As might be expected, the rule of American law allowing a half loss to be treated as a whole loss has given rise to great difficulties in relation to insurances of goods free of particular average, or against total loss only. The question has repeatedly arisen whether for the purpose of such limitations a loss exceeding one half, which is in truth partial, is to be treated as total, because under the law a right to abandon is generally allowed in such a case. Varying decisions on goods policies as to the effect of the rule in such cases have been given, in the Supreme Court of the United States, and in the Courts of some States. Thus the Supreme Court has held that for this purpose a fifty per cent. loss is a partial loss;[1] while in Massachusetts that has been held to be true only in the case of memorandum goods (perishable in their nature), and not of goods not perishable in their nature.[2] I understand that a case[3] raising this latter point stands at present for judgment in the Supreme Court of the United States.

Again consider the operation of the rule on other insurances, such as on freight. Suppose a case like *Rankin* vs. *Potter* (L. R. 6, H. L. 83), an insurance during an outward voyage of freight for the homeward voyage. A constructive total loss of the ship happens on the outward voyage, and hence a failure to perform the homeward voyage and earn the insured freight. If the loss was a constructive total loss within the English rule there has been a clear total loss of that freight. For the rule requires that the ship must really for business purposes have been lost on the outward voyage; and that being so the contract of carriage is at an end. (*Rankin* vs. *Potter* was a difficult case

[1] *Marcardier* vs. *Chesapeake Ins. Co.*, 8 Cranch, 39; Phill. 1615. Phillips, 1614, considered this a mistake.

[2] *Kettell* vs. *Alliance Ins. Co.*, 10 Gray, 144; and see other cases cited in Parsons, Ins. II., 114. Parsons, 118, considered this distinction a mistake.

[3] *Washburn & Moen Manufacturing Co.* vs. *Reliance M. I. Co.*

owing merely to uncertainty as to the law about notice of abandonment.) But how would the matter stand under the United States rule, if only a half loss of the ship had occurred? The homeward voyage in that case would not really have been defeated. Is the freight underwriter to be made to pay a total loss because the law has allowed the shipowner to abandon his ship to the ship underwriter under an entirely independent contract?

Or again compare with an ordinary contract of carriage. Is the shipper to lose his claim to have the goods carried—because a right to abandon to the underwriter on ship has arisen?

Another difficulty in the American rule is that it operates differently according to the place at which it is applied. When a ship has arrived at her home port of destination it is laid down, both as to ship and cargo, that damage exceeding half does not constitute a constructive total loss;[1] and that the test (as to ship) is the English one, viz., is she worth repairing?

The advantage of reality is on the side of the English rule; it is a rule based on fact, not fiction, and so fits in better with other legal consequences of the facts. Unless we are to go back to the old view that an assured should be privileged to abandon when he is in difficulty, and to claim a total loss although there is not a total loss, the English rule seems the one to adopt.

And I come to the like conclusion as between the English rules on this point and those of Continental Europe. To go back to the right of abandonment is cases of shipwreck, and stranding with *bris*, would be to revert to less definite ideas, and therefore to ideas less suited to business. As I have said there have been, and apparently there are, great divergences of view as to the meaning of these provisions of the law.[2] And in relation to cargo at any rate there have been efforts to get rid of them. On a French Commission which sat in 1865 a proposal was brought forward by M. de Courcy to abolish generally the right of abandonment in these cases.[3] The matter was examined as to

[1] Phill. 1532, 1555, 1611. [2] Jacobs, ss. 759, 760.
[3] Jacobs, s. 831.

ship and cargo separately, and it was decided not to propose any alteration. As regards ships it was said that the presumptions on which these cases of abandonment rest are true in most instances; that they prevent as far as possible the difficulties and delays which the assured would encounter in obtaining payment promptly; that promptitude in recovering his funds is necessary for giving the insurance the full effect in view of which it was contracted; and that the legitimate interests of the insurer are safeguarded by the salvage and the premium. As regards cargo, while recognising that in these cases (of shipwreck and stranding) the loss of cargo may be little or nothing, and noting that the commercial practice was to exclude the legal right to abandon by agreement, the Commission considered it better to maintain the law, and leave those who wished to alter it by contract. And here again the justification of the law put forward was to save the assured from the difficulties he would encounter in proving his loss.

We seem here to have an instance of the fixedness and inadaptability of codified law. Many as are the advantages of a code, there are also advantages in not having the law written down and stereotyped. It is left perhaps in a state of comparative vagueness, and even confusion; but that confusion permits of growth; and when the subject-matter of law is developing, widening its fields of operation, and altering its methods, the possibility of growth and adaptation in the law applicable to it is no slight advantage.

To the French argument of convenience, and need of assistance to the assured, it seems sufficient to say that the countries which, in modern times, have had the largest ocean traffic have not felt these needs, and have no corresponding laws in relief or protection of merchants and shipowners as against underwriters. But, further, it seems plain that the need is not felt on the Continent, at any rate by merchants. As appears from the proceedings of the Commission above mentioned, French policies on cargo exclude this protection. Jacobs (s. 831) quotes a clause of the Antwerp policy to the same effect, by which it is provided,

contrary to the provisions of the Belgian code, that abandonment of goods in cases of shipwreck, stranding with *bris*, and innavigability, can only be made when the loss or deterioration amounts to three-fourths of the value.

It remains to consider whether a loss of three-fourths should give the right to abandon. That provision is found not only in the French code, and in the codes of Holland, Belgium, and Spain, which follow that, but it is also, in effect, the rule as to ships in the German code. This last code provides for "abandonment"[1] (1) when the ship is missing, and (2) when the object of the insurance is in danger by the vessel or goods being laid under embargo, or seized by a belligerent, or otherwise arrested by order of Government, or captured by pirates, and not released within certain named periods. It does not seem to provide for abandonment in case of *damage*, either of ship or of goods. But by Art. 877 it enables the assured, where the ship has been duly pronounced to be incapable or unworthy of repair, to put her up for sale by auction, and in case of sale, the loss as against the underwriter is the difference between the net proceeds and the insured value. And the meaning of "unworthy of repair" is defined by Art. 444 of the code to be "when the cost of the repair without deduction on account of the difference between old and new would amount to more than three-fourths of the previous value."

So defined it may be that the rule in Art. 877 generally gives a result pretty near to that of the English test. It is, however, a hard and fast rule, and so will often not fit the facts; and quite possibly the discrepancy from fact may increase as changes progress in ship-building. Further, it seems to ignore the cost of *recovering* the ship, which must surely be added to the repairs. Moreover, if the cost of recovery forms a large part of the whole, the rough accuracy of the rule is greatly disturbed. If a ship worth £10,000 be so damaged that the repairs will cost £7500, it may well be that the repaired ship will not be worth more than £7500. If, however, a ship worth £10,000 strands, but can be

[1] Art. 865.

got off undamaged by spending £7500, it cannot with any accuracy be said that she is constructively a total loss.

The one advantage of the German three-fourth rule seems to be that it avoids the necessity of estimating the repaired value of the ship; but it still requires an estimate of the value of the ship in a sound state, for it expressly excludes the policy valuation; so that no very considerable advantage is gained.[1]

On the whole, it appears to me that this rule also, even limited as it appears to be in the German code to the case of ship, should also be rejected in favour of the more accurate principle of English law.

There may be cases, or classes of cases, in which it is desirable that underwriters shall agree, in certain events, to take over the thing insured, and pay the whole insured amount, although a total loss may not have occurred. There is no wish to interfere with any such arrangements. But let them be made expressly. Do not let it be said that the underwriter pays in such cases because the law makes them cases of total loss. To do so is to spoil the valuable idea of constructive total loss. If that idea is to continue to govern the general right to abandon and claim payment in full, in cases of damage, let us endeavour to keep it in an accurate, logical shape.

I come now to the question, *When* ought the test for constructive total loss to be applied? At what point of time ought the question to be put as to whether the assured is or is not deprived of the thing insured, or as to whether the cost of recovery and repair will exceed the value of the result?

We have here a conflict between the English rule and that prevailing in the United States and in Continental Europe. The former applies the test at the time of commencing an action against the underwriters; any improvement in the position down to that time, other than one produced by the underwriters themselves, is taken into account in their favour. On the other hand, in the United States, as in France, etc., the question is, What was

[1] Art. 877.

the position at the time when notice was given abandoning the insured property to the underwriters? The validity of the abandonment depends on the facts then existing.[1]

It appears to me that this latter is the right rule to adopt, and perhaps there will not be much difference of opinion about it. The right to treat a loss as total when the subject insured still exists is a right of election; the assured elects by giving his notice of abandonment; the question is whether he has done so validly. That depends upon whether the thing insured is or is not *then* a constructive total loss. The English rule to the contrary has sprung from a rule of procedure which requires that the cause of action shall exist at the date of the writ—a rule not of essential importance.

The consistent application of the test at any stated time is not, however, without difficulty. Things happen before and after which affect or throw light upon the position of the insured subject at the critical time, and it is necessary to consider what, if any, effect should be given to them.

As regards subsequent events, they ought to be ignored, except so far as they assist the estimate of the circumstances and of expenses and values, which has to be made from the standpoint of what was known, or may be assumed to have been known, at the critical time; changes in the circumstances which happen after, but could not in ordinary course have been foreseen, should be disregarded.

As regards precedent events, they ought also, I think, to be ignored; but I am not sure that that has always been done. The fundamental question is, Is the ship as she lies worth recovering and repairing; or, are the goods as they lie worth recovering and carrying forward? Suppose, now, that before that critical time expenses have been incurred with a view to diminishing the loss, or that General Average or salvage liabilities have been incurred since the disaster which has caused the loss, ought those expenses and liabilities to be added to the estimate of cost of recovery and repair?

[1] Barber, 324.

By way of illustration, consider the case of a ship battered at sea and taken into a port of refuge, after a jettison, and with the assistance of salvors; and suppose notice of abandonment to be given when the port has been reached. Or, again, consider the case of a stranded ship, where efforts have been made to get her off, by jettison of cargo and employment of salvors, but without the desired result, and notice of abandonment afterwards given.

To take into account the ship's share of these expenses and sacrifices after the casualty, would really be to estimate the cost of recovery and repair as at the time of the casualty, on the conditions then existing. No system of law, so far as I know, does that. If that were the time at which to test, then every capture and every abandonment of a ship at sea would be a total loss, although re-captors, or salvors, might bring her safe into port before any news of the loss had been received.

The expenses we are considering are generally what are known as sue and labour charges, and can usually be recovered from the insurers under the sue and labour clause in the policy. Or, they are General Average expenditures to which the other interests saved must contribute. But however that may be, if the question is whether the ship as she lies, at the critical time, is worth recovering, they are not really elements.

Another question is whether, in estimating the cost of repairing, deduction should be made of any amounts which have to be contributed to that by other interests in respect of damage to the ship by General Average sacrifices, prior to the abandonment.

Here, again, this is not an element in determining whether the ship is worth repairing. The right of the shipowner to General Average contributions for the sacrifice of his ship is complete, and independent of whether the repairs be done or not.[1] If the underwriters pay a total loss they will take over that right. And if the contribution has been already received it must be paid over to them.

[1] The claim to deduct this was given up in Ex. Ch. in *Kemp* vs. *Halliday*, 34 L. J. Q. B. 233; L. R., 1 Q. B. 520; and it was ignored by Blackburn, J., in the Court below.

I propose, then, to adopt the time of notice of abandonment as the time at which the question of constructive total loss or not should be put, and that the question should be whether the thing insured is then a total loss. Cases occur, however, in which a constructive total loss happens without notice of abandonment being given, or required; for example, where the master has properly sold ship or goods after a disaster in order to mitigate further loss; or when the thing insured has been sold under an order of Court, say at the suit of salvors. In such cases I suppose the time for applying our tests must be that of the sale or other event which has made a notice of abandonment useless, and therefore needless.

A third difference, in the laws relating to constructive total losses, arises with regard to the effect of an abandonment upon the rights in the thing insured.

The general rule is that upon payment of a total loss the underwriter becomes entitled to all that remains of the assured's interest in the thing insured, and to all the assured's rights and remedies against others in respect of the loss. But a difference exists as to the time from which this transfer of the property is to date.

In England and in the United States the abandonment relates back to the time of the loss, and the underwriter takes the property from then. On the other hand, in France (Art. 385), Belgium (Art. 216), and Holland (Art. 678), and apparently in Germany also (Art. 872), the transfer only operates from the date of notice of abandonment. There have, however, been very various opinions of French writers on the effect of the provisions of the codes, and some French writers of great influence are of opinion that the transfer operates from the date of the disaster.[1]

On this point I propose that the English and American rule be adopted.

[1] Jacobs ii. 469, citing J. V. Cauvet, E. Cauvet, Weil, and Lyon-Caen and Renault.

Next, as to the effect of the transfer by abandonment upon the freight which was in course of being earned when the loss occurred.

Here the English rule differs from that of the United States, inasmuch as it gives the whole freight earned by the ship, by completing the voyage after the accident, to the underwriter on ship, as owner of the ship. The rule established by the American decisions apportions freight so earned between the underwriter on ship and the assured, or his underwriter on freight.[1]

The Continental codes differ on this matter. The French code (Art. 386) gives the freight (*pro rata*) on goods saved to the abandonees of ship. The Belgian code (Art. 218) gives it to the abandonees of freight. The code is dealing with an abandonment of freight (say for the voyage), and gives the underwriter on freight all freights received, or due, down to the casualty. The German code (Art. 872) provides that the underwriter on ship shall be entitled to the net amount of freight for the voyage, so far as earned after the notice of abandonment.

I propose that the United States rule be adopted, as against the English, and have endeavoured to provide for the case in which part of the freight has been paid in advance. The provision of the German code, that the freight allowed to the underwriter on ship shall be the *net* freight earned after abandonment, seems wrong, since the expenses subsequent to the abandonment will have been chargeable to those underwriters. The division should be of the gross freight, leaving the shipowner to bear the expenses prior to the casualty, and the underwriter on ship to bear the expenses subsequent to that.

II.

In estimating the amount of a partial loss to ship, it has been customary to make deductions from the cost of repairs, with a view to eliminating the advantage to the assured in having new material in place of old.

The customary deductions, however, differ. For purposes of

[1] Phill., 1502, 1650.

General Average, they have largely been made uniform by Rule XIII. of the York-Antwerp Rules of General Average.

It is desirable that they should also be uniform for purposes of insurance; and it is proposed to make the York-Antwerp Rule apply to insurances of ship.

III.

Unseaworthiness and Negligence.

I pass now to the second principal group of differences in the laws relating to marine insurance, those touching the obligations of the assured. I will not attempt to discuss all his obligations, but merely those upon which varying rules exist in different countries.

We may, for discussion, divide these into two: (*a*) unseaworthiness of ship; (*b*) negligence in the conduct of the adventure.

(*a*) First, as to the obligation to have the ship seaworthy. The law as to this in England seems to me very unsatisfactory. It is over-severe against the assured in some respects, and over-lax in others. In a voyage policy it requires definitely that the ship shall have been in a seaworthy state on sailing upon the voyage. Care to provide this is insufficient; the care must have succeeded; that a defect which rendered the ship unfit was latent, and could not have been discovered by any reasonable effort, is no excuse.

Further, this warranty is made a *condition* of the policy. If not satisfied, the policy either does not attach or it ceases to be effectual. So that if a ship were to sail with an insufficient supply of coal for the voyage, and were to be destroyed by a tempest, the underwriter would not be liable, although that happened quite irrespective of the coal supply, and even without the shortness of coal having been discovered.

And these very severe conditions apply not only to voyage policies on ships but also to policies on goods.

On the other hand, under English law, if the ship has first sailed seaworthy the underwriter is liable for losses by sea perils,

even though there may have been gross negligence in allowing the ship to leave a port of call, or port of refuge, in an unfit state, and although the losses would not have happened but for that. Further, in the case of time policies, the law imposes no provision or condition as to seaworthiness at all. So that the underwriter is liable for a loss by sea perils although occasioned by the ship's unseaworthiness, unless he can show that she was sent to sea in that condition by the assured wilfully.

The law of the United States corrects some of these defects. It applies the warranty to time policies as well as to voyage policies; and it imposes (as I understand) an obligation to use care to do at each port of call what reasonably should be done to make the ship fit, before sailing thence.[1]

On the other hand, that law appears to make performance of the warranty a condition of the policy;[2] and also applies it to insurances of goods,[3] and thus maintains and extends the over-severity of English law.

On the continent of Europe the state of the law is very different. The codes do not impose any condition of seaworthiness.

In France (352), Belgium (183), and Holland (276), losses caused by the act or default of the shipowner or his agents do not fall upon the underwriter on ship, nor do losses which happen owing to inherent defects in the ship; so that the assured will fail to recover for a loss by perils of the sea if that was contributed to by some defective state of the hull or machinery, or by some negligent failure of his agents to provide a proper crew, fuel, etc.

But a distinction has to be noted. Generally the insurance covers the peril of "barratry," and that is treated in the laws we are considering as including negligent acts of the master and crew. So that if a ship leaves a port with, say, an insufficient supply of coal, owing to negligence of the master or engineer, it would seem that underwriters must pay for losses consequent

[1] Phill., 731; Barber, s. 109.
[2] Qy. the operation of the policy may be suspended and revived: Phill., s
[3] Barber, s. 107.

upon that; unless perhaps it can be said that such an act is not condition done by the master as such.

Apparently a claim on a policy on goods is not affected by the condition of the ship, or by the defaults of the ship's agents.

The German code (825) expressly deals with the subject of unseaworthiness. In the case of insurances of *ship or freight* it provides that the underwriters are not liable for damage occasioned in consequence of the vessel having been sent to sea in an unseaworthy condition. Presumably this applies at each port from which a sailing is made. It does not seem to make the seaworthiness a condition of the policy. Nor does it, apparently, apply to cargo policies.

Among these different systems it is evidently necessary to make some compromise. With this view let us put some questions.

(1) Ought the obligation to make the ship seaworthy (the warranty of seaworthiness), in whatever shape we put it, to be *a condition* of the insurance? Ought the whole effectiveness of the policy to disappear if that is not satisfied? Or will it be enough that the insurer shall not be liable for losses consequent upon a breach of the warranty?

If it is not necessary to take the more severe position, it seems very desirable to avoid doing so. I suggest that the view of Continental Europe is the better one.

(2) How far should the warranty extend? Should it amount to a promise that the ship shall on sailing be free from defects rendering her unfit, including latent defects which no reasonable care would discover? Or should it only warrant against causes of unseaworthiness which reasonable care would have avoided?

Here again England and the United States present the severe view—the continent of Europe presents a mixed view; on some points (*vice propre*) the full severity; on others (equipment) the test of whether there has been negligence; and again, on other points (when acts of the crew are involved), the warranty seems to disappear entirely.

I suggest that the less severe view is the right one to adopt; more especially if the warranty is extended (as I would propose)

to every sailing from a port during the currency of the policy. Let the assured be bound to see that reasonable care be taken to have the ship seaworthy on each such sailing; but let him not lose his indemnity when there has been no failure to take such care, even though a defect in the ship has caused the loss. And let the underwriter be relieved from liability for losses which arise from a breach of the assured's obligation, but not from other losses by perils insured against.

(3) Ought the warranty to apply to time policies as well as to voyage policies?

The difficulty pointed out in England is that a time policy often attaches when the ship is at sea. In the United States, I am in doubt whether the warranty relates to the last previous sailing, or to the next subsequent sailing. On the Continent of Europe no distinction seems to be drawn between the two classes of policies.

The suggested rule that an undertaking to use care shall relate to each sailing during the currency of the policy, will be applicable to time policies as well as to voyage policies, and will avoid difficulties.

(4) Should the warranty be implied in policies on goods?

I suggest that it should not, adopting the view of Continental Europe. Shippers of goods cannot control the matter. Their underwriters generally know more of the ships which carry their goods than they do. Why, then, should the shippers run this risk of losing their insurances?

In practice, I believe, underwriters in England never think of relying upon this warranty as against an assured on cargo. If it be desired that such a warranty should form part of the contract, it should be expressed in the policy.

On the whole, I submit as a fair compromise Rule 18. That rule will, in England, at any rate, give very considerably more protection to underwriters on ships than they have at present. At the same time, it will mitigate the needlessly severe operation of the existing law against the assured, in some cases.

(*b*) Next, as to the effect of negligence of the assured or his servants in the conduct of the adventure. Here there is a very marked difference between the view established as law in England and in the United States, and the law laid down in the Continental codes of Europe.

With us the question to be put is, Was the loss proximately caused by a peril insured against? If it was so caused, it is immaterial that that cause was brought into operation by some negligence of the assured, or his agents or servants. Where, owing to some carelessness of an officer, a ship is steered on to a rock, or into collision with another ship, and sunk, the underwriter must pay, the loss being by a sea peril. Where, owing to carelessness of men employed in port, say mechanics or stevedores, the ship is set on fire, the underwriter must pay, the loss being by fire.

The one exception is that, when the assured has himself wilfully brought about the loss, he cannot put that upon the underwriters; he is not allowed to take advantage of his own wrong.

One other case, which may possibly be regarded as an exception, is that the underwriter cannot be made liable for an aggravation of a loss by a peril insured against where the assured might, by reasonable effort, have prevented that aggravation. For example, the underwriter is not liable for a total loss arising from a compulsory sale (say by salvors of a derelict ship) where the assured might, by reasonable exertions, have prevented the sale.[1]

In such a case the subsequent loss is not the natural consequence of the peril.

The law in the United States is (as I understand it) the same as with us. It does not regard the remote negligence as the cause of the loss, and does not disqualify the assured from recovering.[2]

[1] *Stringer* vs. *English, etc., Co.* (L. R. 4, Q. B. 691); and see Phill., 1046.

[2] Barber, s. 81; Phillips, 1046, 1049, 733; also Arnould, 6th, 760; citing *Patapsco Co.* vs. *Coulter*, 3 Peters, 222; *Columbia Co.* vs. *Laurence*, 10 Peters, 517; *Waters* vs. *Merchant Co.*, 11 Peters, 213; 3 Kent Comm. 303, 304.

In France, and in those countries which follow the French code, the law, as I understand, is different. The fact that the loss has been brought about by negligence of the assured or his servants or agents, is a defence to the underwriter. If, however, the insurance covers "barratry" (as usually it does[1]), careless acts and neglects of the master and crew are treated as barratry, with the result that the underwriter remains liable. This view of the meaning of "barratry" widely differs from that taken with us and in America. We apply it only to fraudulent or wilfully illegal acts. The difference may be of serious importance; for if the French view be taken, an insurance against barratry would seem to cover accidental damage (say to the ship's engines) by mere carelessness or neglect of the engineers, without any peril of the sea, a result which does not accord with the effect of an ordinary policy in England.

But, apart from "barratry," the underwriter under French law incurs no liability if the loss has been a result of negligence of the assured, or his servants or agents, on sea or on land.[2]

Under the German code (Art. 825), the underwriter is not answerable for "damage arising out of any *default* of the assured," or, in the case of cargo or profits, for damage "occasioned by a default of the shipper, consignee, or supercargo in their respective capacities." I am, however, in doubt as to the meaning of default, and as to whether this is held to include defaults by the servants or agents of the assured (*Cf.* Art. 824 (6) as to underwriter's liability for loss by dishonesty or default of the crew).

The sound rule on this subject is, I suggest, that which obtains in England and in the United States, a rule which has been developed by the cases which have arisen, and in view of the needs of business. The mistakes, neglects, and careless acts of men are among the ordinary vicissitudes of marine adventures.

[1] The German Code, 824 (6), and the Belgian Code, 184, presume that barratry is to be covered. On the other hand the French Code, 353, and the Portuguese, 604, exclude it unless agreed; while the Dutch Code (637, 640) seems to exclude it from insurances on ship or freight unless agreed, but to include it in other cases.

[2] Jacobs, s. 774.

Those mistakes and acts become of serious moment owing to the perils by which such adventures are beset; and the object of marine insurance is to get rid of the risks from those perils, whether they occur by pure accident or through mistakes made, and whether they arise with overwhelming force, or become important through failure of precaution or promptness in meeting them.

In contracts of carriage the modern practice is to relieve shipowners from responsibility for the absolute fitness of their ships, and from liability for the mistakes and neglects of their servants. Far less should contracts of insurance leave those risks upon the shipowner if they are to meet his need for insurance. It seems plain to me that a set of insurance rules which had that effect would be of no practical value.

IV.

The remaining subject to be dealt with is that of double insurances.

It sometimes happens that the same insurable interest is insured by several policies to more than its full amount in the aggregate. This may happen by mistake, or may be done for greater caution, where the assured doubts the solvency of some of his insurers. It would be contrary, of course, to the principles of the law to allow the assured to recover under such insurances more than the full value of his interest once. But there is more than one way of regarding the effect of these double or over-insurances.

On the one hand it is under some systems of law considered that when the full interest of the assured has once been covered, any subsequent insurances are made without interest, and are invalid. So that the order of dates must be looked at, and no recovery be allowed upon any of these later insurances.[1]

Under other systems the view taken is that all the insurances are valid contracts; that the assured may enforce any of them in any order provided he only recover the full amount of his insured interest once; while the rights of the insurers *inter se* are ad-

[1] *E.g.*, France, 334, 359; Holland, 277; Germany, 792.

justed by allowing those who have paid to claim contributions from those who have not.

It seems plainly necessary that as insurances done on the same subject, in different countries, may be done so as to produce double insurance, there should be one rule on this subject for all. I suggest that the rule to be adopted is that which regards all the insurances as valid.

There is no theoretical necessity for not so regarding them, and to refuse to do so is a considerable hardship when double insurance is effected in order to guard against insolvency of underwriters. This hardship is met in some of the codes by allowing a second insurance to be made, provided it be made expressly on the terms that the assured can only claim under it whatever he cannot recover under the first.[1]

There are practical reasons also in favour of the (English) rule, which regards all the policies as valid. Under it the underwriters are all on an equal footing, and there is no necessity to inquire into the dates when the insurances have been effected. Looking at the very various modes in which insurances are effected one sees many opportunities for difficulty in such inquiries; *e.g.*, is the date of the slip, or original agreement, or of the policy, to be looked at?[2] Where insurances on goods are partly under open cover, or covers, and partly by special insurances, how are the dates to be reckoned? The necessity for rules of contribution of the underwriters *inter se* is not obviated under the French system; for policies of the same date are treated as simultaneous.

A further important practical difference arises when the valuations under the several policies differ. Under the English system there is not much difficulty in seeing the position of the assured, or in arranging the manner in which contributions are to be made among the underwriters.

As an example, suppose three insurances made of the same subject matter, with X, Y, and Z, on valuations respectively of £1000, £1500, and £2000. And suppose the insurance with

[1] Holland, 286; Germany, 793.

[2] France, 359, says the date of the policy.

X to be for £1000, with Y for £1000, and with Z for £500. Then suppose a partial loss, amounting say to £500, to take place.

Under the English rule X, Y, and Z would each be liable; X to pay 50 per cent. of the amount he has insured; Y to pay 33 per cent.; Z to pay 25 per cent. But the assured must not from all of them together recover more than 100 per cent. of his loss; and X, Y, and Z must contribute *inter se* in proportion to their several liabilities, in regard to the loss, under their policies.

If the loss were total, instead of partial, X, Y, or Z would be liable to the assured in the full amount insured by his policy, provided that amount had not already been recovered from the others. The contributions *inter se* are less easily expressed. In all the assured would recover £2000 in respect of his total loss. Of this, the last £500 was only recoverable from Z, and should not be considered as doubly insured. The next preceding £500 was then only insured by Y, and again should not be treated as doubly insured. The remaining, first, £1000 was, however, insured by X (for £1000) and by Y (for £500); X and Y should therefore contribute towards it (*inter se*) in the proportions of two-thirds and one-third.

I do not know how the French system (say) would be applied in such cases. Would X pay the whole of the partial loss of £500? Would the Y and Z policies be treated as valid at all? And if so could X call on them for any and what contributions?

But this is not a matter which can be conveniently discussed in detail at the end of this paper. I will merely submit that, as there is nothing wrong in insuring twice over, contracts should not be treated as invalid because they have that effect unless some serious practical reasons can be advanced for so doing.

Let me say again that there is no idea of in any way restricting complete freedom of contract. Where the circumstances of a particular case require it special clauses can be used. The object aimed at is to arrive at sound rules suitable for adoption in

the general case, in all countries, upon those points on which marine insurance law differs in one country and another. The incorporation of the rules in the ordinary form of policy in use will still leave it open to insert special clauses, in any case, to exclude or modify the effect of the rules upon any particular point.

A print of proposed rules, intended to carry out the suggestions of this paper, is in your hands. But it would be too much to suppose that they could be discussed and dealt with off hand. The drafting requires careful, detailed criticism.

I, therefore, only ask you now to consider the leading principles to be adopted. These are expressed in the thirteen resolutions, of which a print also is in your hands. If those resolutions, or modifications of them, commend themselves to you, I ask you to adopt them, and to refer the drafting of the rules, which shall work out their effect, to a committee, who may consider and report hereafter.

The following are the resolutions which were proposed. All, except the first three, were adopted by the Conference. The first three resolutions, and the draft of rules prepared to work out the resolutions, were referred by the Conference to a Committee, to consider and report to a conference to be held in 1900.

Marine Insurance Resolutions.

Constructive Total Losses.

I.

1. That, in cases of damage, the test of constructive total loss of ship should depend upon whether the whole cost of recovering her and making her fit for the same service as before would exceed her value when recovered and repaired.

2. That, in case of damage, a constructive total loss of cargo should be allowed when, and only when,

(1) Owing to perils insured against it cannot be carried

forward to the destination, or if so carried would not arrive in specie; or

(2) Owing to perils insured against, the carrying ship cannot complete the voyage with the goods, and the shipowner does not forward them, and they can only be brought to the destination by incurring expenses of recovering, conditioning and forwarding, which would exceed their gross market value on arrival, less expenses of selling.

3. That the right to claim payment of a total loss should depend upon the position and condition of the ship or cargo at the time of giving notice of abandonment; or, at the time of the event happening which has made notice of abandonment unnecessary. The estimate of whether ship or cargo is a constructive total loss should be with reference to the apparent and probable circumstances at the time above defined.

4. That the right of the insurer to the salvage, upon payment of a total loss, should relate back to the time of the casualty which caused the loss.

5. That freight earned by the ship by completing an insured voyage after transfer to the insurer, should be apportioned between the assured and the insurer in proportion to the distances run by the ship in earning that freight before and after the casualty.

6. That an insurer of freight who insures against partial loss should indemnify the assured in respect of freight loss by him owing to a constructive total loss of ship, although the whole freight may have been earned by the ship after transfer to the insurer of ship.

II.

Particular Average of Ship.

7. The deductions from the cost of repairs in respect of new for old, for ascertaining the amount of a partial loss of ship, should be those allowed by Rule XIII. of the York-Antwerp Rules of General Average.

III.

Seaworthiness and Negligence.

8. That in any insurance of ship, or of any interest dependent upon ship, the assured (subject to express agreement) should be considered to warrant as follows:

(1) That where the insurance first attaches in port, all reasonable care has been taken to make the ship then in a fit condition to lie there.

(2) That all reasonable care will be taken to make the ship fit and properly manned, equipped, and documented for her voyage on each sailing from any port during the currency of the insurance: Provided that where the voyage includes more than one stage it will suffice that care be taken to make the ship fit and properly manned, equipped, and documented at the beginning of each stage for that stage.

9. That the insurer should not be liable for any loss consequent upon a breach of the warranty stated in 8, although proximately caused by a peril insured against; but that the insurance should not be conditional upon performance of that warranty and should not be invalidated by a breach of it.

10. That no other warranty of seaworthiness should be implied in insurance of ship or interest dependent upon ship; nor should any such warranty be implied upon an insurance of cargo.

11. That subject to the warranty stated in 8 an insurer should be liable for any loss caused proximately by a peril insured against, although brought about or contributed to by neglect of the assured, or by neglect or wilful act of his servants or agents or by an inherent vice or weakness of nature, or unsoundness in condition of the thing insured.

IV.

Double Insurance.

12. That in cases of double insurance the assured may recover in respect of a loss under any of the policies covering it, in any order, unless he has already received indemnity for the loss as estimated upon the valuation in that policy; all the policies being treated as effectual, and the insurers being entitled to contributions *inter se.*

13. That the assured should not be entitled to return of premiums on the ground of double insurance where the risk has attached.

E. W. B.
2-8-38

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